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IN THE

Supreme Court of the United States

October Term, 1956

No. 433

SEBASTIANO NANI, *Petitioner*

v.

HERBERT BROWNELL, JR., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM H. COLLINS
Shoreham Building
Washington 5, D.C.

SAMUEL PAIGE
261 Broadway
New York 7, N.Y.
Attorneys for Petitioner

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Sebastiano Nani, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on June 27, 1957.

OPINIONS BELOW

The opinion of the District Court is unreported. It is set forth in the appendix to petitioner's brief (pp. 7-9), submitted to the United States Court of Appeals, hereinafter referred to as the "Record".

The opinion of the Court of Appeals is unreported. It is set forth in the appendix to this petition, infra pp. 19-22.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Did the Board of Immigration Appeals violate Section 6.1(f) of Title 8 of the Code of Federal Regulations by its failure to serve a copy of its decision upon petitioner or his counsel?

2. Did the Board violate Section 6.1(h) of Title 8 of the Code of Federal Regulations by its failure to give notice to the petitioner or his counsel of the reference of its decision to the Attorney General for review?

3. Did the failure of the Board, set forth in questions 1 and 2, violate Section 292 of the Immigration and Nationality Act (8 U.S.C. Section 1362, 66 Stat. 235) by depriving the petitioner of representation by counsel in appeal proceedings before the Attorney General?

4. Did the failure of the Board, set forth in questions 1 and 2, resulting in the exclusion of petitioner and his counsel from participating in the decisive phase of the deportation proceedings, deprive him of due process, in view of the fact that the Board transmitted its decision to the Commissioner of Immigration and Naturalization, the adversary party, who thereafter submitted written argument attacking such decision, without the knowledge of the petitioner?

5. May an alien be deported on grounds other than those set forth in the warrant of arrest in deportation proceedings?

6. Was a conviction of conspiracy (18 U.S.C. Section 371, 62 Stat. 701) a basis for deportation under Section 241(a)(11) of the Immigration and Nationality Act?

STATUTES AND REGULATIONS INVOLVED

During the pendency of the deportation proceedings here involved, Section 241(a)(11) of the Immigration and Nationality Act (66 Stat. 204, 206-207, U.S.C.A., Title 8, Section 1251(a)(11)) provided as follows:

> "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who — • • •
>
> "(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate;"

Section 292 of the Immigration and Nationality Act (66 Stat. 235, U.S.C.A., Title 8, Section 1362) provides as follows:

> "In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."

The pertinent regulations appear in Title 8 of the Code of Federal Regulations, and are as follows:

"Section 6.1 *Board of Immigration Appeals*—(a) *Organization.* There shall be in the office of the Attorney General a Board of Immigration Appeals. • • •

"(b) *Appellate jurisdiction.* Appeals shall lie to the Board of Immigration Appeals from the following: • • •

"(2) Decisions of special inquiry officers in deportation cases, as provided in Section 242.61 of this chapter; • • •

"(e) *Oral argument.* Oral argument shall be heard by the Board upon request, in any case over which the Board acquires jurisdiction by appeal or certification as provided in this part. If an appeal has been taken, request for oral argument if desired shall be included in the Notice of Appeal. • • • The Service may be represented in argument before the Board by any officer designated by the Assistant Commissioner, Inspections and Examinations Division. • • •

"(f) *Service of Board decisions.* The decision of the Board shall be in writing and copies shall be transmitted by the Board to the Service and a copy served upon the alien or party affected as provided in Sections 292.11 and 292.12 of this chapter. • • •

"(h) *Referral of cases to the Attorney General.* (1) The Board shall refer to the Attorney General for review of its decision all cases which:

"(i) The Attorney General directs the Board to refer to him. • • •

"(iii) The Assistant Commissioner, Inspections and Examinations Division requests be referred to the Attorney General for review. • • •

"Section 292.11 *Service upon and action by attorney, representative, or alien.* Except where specific provision is otherwise made in this chapter, whenever

a person is required by any of the provisions of this chapter (a) to give or be given notice; (b) to serve or be served with any paper other than a warrant of arrest or a subpoena; (c) to make a motion; (d) to file or submit an application or other document; or (e) to perform or waive the performance of any act, such notice, service, motion, filing, submission, performance, or waiver shall be given by or to, served by or upon, made by, requested of (1) the attorney or representative who has filed an appearance in the case as provided in Section 292.5, or (2) the person himself, if there is no attorney or representative in the case.

"Section 292.12 *Service of decision and other papers.* Except where specific provision is otherwise made in this chapter, whenever a decision, notice or other paper is required to be given or served, it shall be done by personal service or registered mail upon the person designated in Section 292.11."

STATEMENT

Petitioner, a native of Italy, has been a resident of the United States continuously since 1924, at which time he was 18 years of age. He is married to a native born citizen of the United States and has three children, all of whom were born in this country. (R. 13)

Deportation proceedings against petitioner were instituted on August 30, 1954 by the service upon him of a warrant of arrest. (R. 10-11) The warrant charged that the petitioner was deportable for the following reason:

"Section 241(a) of the Immigration and Nationality Act, in that, he has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing,

giving away, importation or exportation of any of the drugs described therein; Conspiracy (18 USC 371) to violate Jones-Miller Act (21 USC 174) and Harrison Narcotic Act (26 USC 2553 (a))."

A hearing was held before a special inquiry officer, who prepared a Conclusion of Law in the identical language contained in the warrant of arrest (R. 12-13). Based on such Conclusion of Law, he ordered that the petitioner be deported.

The petitioner thereupon filed a notice of appeal to the Board of Immigration Appeals.

The Board is created by regulations which define its jurisdiction and procedures (Title 8, Code of Federal Regulations, Sections 6.1 and 6.11). By virtue of such regulations, the Commissioner and the alien involved in a deportation proceeding are both entitled to present oral argument before the Board.

The Board on April 14, 1955, in a carefully reasoned decision, ordered that the deportation proceedings against petitioner be terminated for the reason that a conviction of conspiracy was not a basis for deportation under Section 241(a)(11) of the Immigration and Nationality Act (8 U.S.C. Section 1251(a)(11), 66 Stat. 204). (R. 14-17)

The Board stated in part as follows:

"While it is true that the substantive acts which are charged in the record of conviction as the objects of the conspiracy relate to the illicit traffic in narcotics it is well settled that a conspiracy to commit a crime is a different offense, notwithstanding that the substantive offense is charged as one of the overt acts committed in furtherance of the conspiracy. The crime of conspiracy to commit an offense is distinct from the offense itself. It has been repeatedly declared in decisions of the Supreme Court that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. The con-

spiracy is the crime, however diverse its object. A conspiracy is not the commission of the crime which it contemplates, and neither violates nor 'arises under' the statute whose violation is its object." (Footnotes omitted.)

The Board, however, did not notify petitioner or his counsel that its decision and order had been rendered and did not serve upon either of them a copy thereof. (R. 4) It did, however, immediately transmit a copy of its decision to the Commissioner of Immigration and Naturalization. On the very day of the Board's decision, the Commissioner, without the knowledge of petitioner or his counsel, submitted a motion wherein he set forth argument that the Board's interpretation of the statute and its decision were erroneous, and he requested that such decision be referred to the Attorney General for review (R. 17-19).

Thereafter, the Board, again without notice to petitioner or his counsel, referred its decision to the Attorney General. On September 23, 1955 the Attorney General reversed the decision and order of the Board. (R. 19-21) Thereafter, a copy of the decision of the Board of Immigration Appeals and of the decision of the Attorney General, reversing the Board, were transmitted to counsel for the petitioner.

Petitioner instituted this action on November 27, 1956, to secure review of the deportation order and injunctive relief therefrom. (R. 1-5) In his complaint, petitioner contended that the deportation proceedings were defective because they violated the requirements of applicable regulations, because he had been deprived of his right to due process, and because his conviction of conspiracy was not a basis for deportation.

A motion by respondent for summary judgment was granted by order of the District Court on April 3, 1957 (R. 6). The Court (McGuire, J.) held, first, that peti-

tioner's conviction of conspiracy rendered him deportable, and second, that he was not entitled under the regulations to notice that the decision of the Board of Immigration Appeals had been referred to the Attorney General for review. The Court implied that the requirements of due process were satisfied if there had been a compliance with such regulations. (R. 7-9).

The Court of Appeals, Circuit Judge Bazelon dissenting, affirmed. The majority opinion agreed with the District Court that petitioner's conviction of conspiracy made him deportable. It held that since the case involved solely a question of law, with respect to which the majority was in agreement with the Attorney General, petitioner could not allege a lack of due process or noncompliance with law and regulation.

The dissenting opinion held that petitioner was entitled under applicable regulations to notice that the decision of the Board of Immigration Appeals, in his favor, had been referred to the Attorney General for review and that the plain purpose of such notice was to give petitioner an opportunity to support his position in a brief to the Attorney General. It further held that petitioner had been deprived of that opportunity since he was not given notice until after the Attorney General had reversed the decision of the Board. Relying on *Accardi* v. *Shaughnessy*, 347 U.S. 260, the dissent stressed the importance of preserving the integrity of each step in the regulatory scheme for administrative decision. The dissenting opinion also contained the following language:

> "As long as the regulations in the instant case remain operative, the appellant must be afforded the opportunity to defend the Board's decision in his favor and the Attorney General must fairly consider any argument made. Since appellant was denied the opportunity to defend the Board's favorable decision

before the Attorney General reversed it, the Attorney General's decision was not made in accordance with law and is therefore fatally defective."

REASONS FOR GRANTING THE WRIT

1. The instant case for the first time poses before this Court the question of the rights of an alien in the concluding phase of deportation proceedings. Petitioner had duly filed his notice of appeal from the adverse decision of the special inquiry officer. Since both the Commissioner and the petitioner were entitled by virtue of Section 6.1(e) of Title 8 of the Code of Federal Regulations to argue the case before the Board of Immigration Appeals, the proceedings were clearly of an adversary character. Counsel for the petitioner argued before the Board on his behalf.

The facts disclose, however, that subsequent to such argument, both petitioner and his counsel were systematically and entirely excluded from further participation in these proceedings. In violation of Section 6.1(f) of Title 8 of the Code of Federal Regulations, the Board did not serve upon petitioner or his counsel a copy of its decision. In violation of Section 6.1(h) of Title 8 of the Code of Federal Regulations, the Board did not notify petitioner or his counsel of the reference of its decision to the Attorney General for review. On the other hand, petitioner's adversary, the Commissioner, was furnished with a copy of the Board's decision and submitted written argument attacking such decision for the consideration of the Attorney General. The petitioner and his counsel were not notified of such argument and therefore had no opportunity to respond to it.

It was not until the decision of the Board had been reversed by the Attorney General that petitioner was notified thereof. A period of over four months had

elapsed from the rendition of the Board's decision to its reversal by the Attorney General. During this crucial period, petitioner and his counsel were kept in complete ignorance of these developments. These proceedings violated the regulations herein cited and they also deprived the petitioner of the privelege of representation by counsel before the Attorney General, guaranteed by Section 292 of the Immigration and Nationality Act. Moreover, they clearly violated the constitutional requirement of due process of law. They also violated the concept of fair play in that an adversary was given an unfair advantage.

This Court has recognized that deportation may result in the loss of all that makes life worth living. *Ng Fung Ho* v. *White*, 259 U.S. 276. Accordingly, it has consistently held that an alien is entitled to due process of law in deportation proceedings. *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149; *Accardi* v. *Shaughnessy*, supra; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33; *Bridges* v. *Wixon*, 326 U.S. 135, 152-153. It has also held that such protection extends to all phases of such proceedings.

It is respectfully submitted that this Court should strike down the decision of the Court below, which has the dangerous effect of sanctioning a departure not only from the requirements of due process and fair play but also from the regulations and statutes designed as safeguards for the alien. There is not the slightest foundation for the position of the Court below that these basic rights need not be upheld where issues of law as distinguished from issues of fact are involved. On the contrary, as Circuit Judge Bazelon indicated in his dissent, the integrity of each step in deportation proceedings must be preserved and, since the Attorney General's decision was not made in accordance with law, it is fatally defective.

In *Bridges*, supra, this Court stated in part as follows:

> "The rules are designed to protect the interests of the alien and to afford him due process of law. . . . The rules afford protection at that crucial stage of the proceedings or not at all. . . . It was assumed in *Bilokumsky* v. *Tod*, 263 U.S. 149-155, that 'one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law'. We adhere to that principle. For these rules are designed as safeguards against essentially unfair procedures." (pp. 152-153)

2. In *Morgan* v. *United States*, 298 U.S. 468, this Court held that the right to submit argument, oral or written, to the person making the ultimate decision in an administrative proceeding was one of the essentials of due process. In the second *Morgan* case, 304 U.S. 1, this Court used the following language, which is especially pertinent:

> "The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps. . . . The maintenance of proper standards on the part of administrative agencies and the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. For, as we have said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purpose for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play." (pp. 20-22)

The principle of the *Morgan* cases was embodied in Section 8(b) of the Administrative Procedure Act (5 U.S.C. Section 1007(b), 60 Stat. 242), which provides in pertinent part as follows:

"SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. . . ."

In *Wong Yang Sung* v. *McGrath*, supra, this Court stated (pp. 50-51):

"When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It may be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemened by Congress as unfair even where less vital matters of property rights are at stake."

Thus, even in the absence of regulation, petitioner would have the right to submit argument to the Attorney General.

3. The warrant of arrest charged that the petitioner

". . . is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit:

"Section 241(a) of the Immigration and Nationality Act, in that, he has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation, or the possession for the purpose of manufacture, production, compounding,

transportation, sale, exchange, dispensing, giving away, importation or exportation of any of the drugs described therein; Conspiracy (18 USC 371) to violate Jones-Miller Act (21 USC 174) and Harrison Narcotic Act (26 USC 2553 (a))." . (R. 10-11)

The Attorney General found petitioner deportable as an alien who had been convicted of

"'. . . a violation of any law or regulation relating to to the illicit traffic in narcotic drugs. . . ."

Section 241(a)(11) of the Immigration and Nationality Act at the institution of these proceedings and during their pendency defined three separate and distinct classes of deportable aliens: first, aliens who are or at any time after entry have been narcotic drug addicts; second, aliens who at any time have been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs; and third, aliens who have been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction forming or addiction sustaining opiate.

It is apparent, therefore, that the warrant of arrest charged the petitioner with being within the third category of deportable aliens set forth in Section 241(a)(11) of the Immigration and Nationality Act.

The Attorney General, however, did not find that the petitioner was within said third category of deportable aliens. In effect, the Courts below and the Attorney General found that the petitioner had not been convicted of a violation of any law or regulation as set forth

in the warrant of arrest. They found instead that petitioner was deportable as coming within the second category of deportable aliens, namely, those who had been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs. The warrant of arrest, however, did not charge the petitioner with being within this category.

Thus, the petitioner has been held deportable on a charge different from that alleged in the warrant of arrest. Such finding is in conflict with a basic requirement of due process. *Takeo Tadano* v. *Manney*, 160 F.2d 665.

4. The Courts below and the Attorney General regarded the following language of Section 241(a)(11) of the Immigration and Nationality Act as applicable to the instant case:

> "Any alien . . . shall . . . be deported . . . who . . . has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs . . ."

It is apparent from a reading of th estatute that the word "relating" qualifies the words "any law or regulation". In other words, a relationship must exist between the law or regulation which has been violated and the illicit traffic in narcotic drugs.

The Court below agreed with the District Court that petitioner's conviction of conspiracy was "a violation of any law or regulation relating to the illicit traffic in narcotic drugs".

This Court has consistently held that the crime of conspiracy is wholly separate and distinct from the crime that is the object of the conspiracy. *Braverman* v. *United States*, 317 U.S. 49; *United States* v. *Bayer*, 331 U.S. 532; *United States* v. *McElvain*, 272 U.S. 633; *United States* v. *Rabinowich*, 238 U.S. 78; *American Tobacco Co.* v.

United States, 328 U.S. 781. The decision of the Court below, finding a relationship between the crime of conspiracy and the object of such crime, is in direct conflict with the prior decisions of this Court. It is respectfully submitted that such conflict should be reviewed by this Court.

Legislative history fortifies the conclusion that petitioner's conviction of conspiracy did not make him deportable. In its decision, the Board of Immigration Appeals stated:

> "Previously, deportability based upon the illegal traffic in narcotics was contained in the Act of February 18, 1931, as amended, (8 USC 156(a)) which provided:
>
> > "That any alien . . . who, after the enactment of this Act, shall be convicted for violation or *conspiracy to violate* any statute of the United States . . . taxing, prohibiting or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of . . . heroin . . . shall be taken into custody and deported in manner provided in Sections 19 and 20 of the Act of February 5, 1917. . . .
>
> "A comparison of the 1931 and the 1952 Acts concerning deportation on the ground of illicit traffic in narcotics reveals that the former specifically includes not only a conviction for a violation of a narcotic trafficking statute but also a conviction for conspiracy to violate such a statute, while the latter act is silent on this point of conspiracy and refers only to a conviction of a violation of any law or regulation *relating* to the illicit traffic in narcotic drugs. We conclude that this omission is fatal insofar as the present conviction is concerned, since in the instant case the alien has been convicted only of conspiracy in violation of 18 USCA 371. . . ."

It is also significant that elsewhere in the Immigration and Nationality Act, Congress has specifically provided

for the deportation of aliens who have been convicted of a violation or "conspiracy to violate" a specified law. Section 241(a)(5), 8 U.S.C. Section 1251(a)(5), 66 Stat. 204; Section 241(a)(17), 8 U.S.C. Section 1251(a)(17), 66 Stat. 207.

It is also significant that on July 19, 1956, long after the instant deportation proceedings were completed, Congress amended Section 241(a)(11) of the Immigration and Nationality Act so that the word "conspiracy" specifically appears therein. 70 Stat. 567, ch. 629. With reference to such amendment, Senate Document No. 145 (84th Congress, 2d Session) contains the following language (p. 4):

> "Section 241 (a) (11) is amended to include conspiracy to violate a narcotic law, and the illicit possession of narcotics, as *additional* grounds for deporting an alien." (Emphasis supplied.)

House Conference Report No. 2546 (84th Congress, 2d Session), reprinted in United States Code Congressional and Administrative News, Vol. 2 (1956), p. 3021, states:

> "Section 201 of the Senate amendment amended three provisions of the Immigration and Nationality Act. . . .
>
> "(2) It amended Section 241(a)(11) of that act by including conspiracy to violate any narcotic law, and the illicit possession of narcotics, as *additional* grounds for deporting any alien. . . .
>
> "The House bill contained no amendments to the Immigration and Nationality Act. The provisions in the conference agreement amending that act are in substance the same as the provisions contained in the Senate amendment." (Emphasis supplied.)

It thus conclusively appears that Congress was aware that a conviction of conspiracy was not a basis for deportation under Section 241(a)(11) of the Immigration and Nationality Act prior to its amendment, and that the

specific purpose and intent of Congress in amending Section 241(a)(11) was to make conspiracy an additional ground for deportation thereunder.

Moreover, the Attorney General has in effect confessed error in the instant case. In a letter dated May 4, 1945, to the Committee of the Judiciary of the United States Senate with respect to the then proposed Narcotic Control Act of 1956, the Deputy Attorney General pointed out that both Section 212(a)(23) of the Immigration and Nationality Act (8 U.S.C. Section 1182(a)(23), 66 Stat. 184), dealing with exclusion, and its counterpart, Section 241(a)(11), dealing with deportation, failed to provide for conspiracy as a ground for exclusion or deportation, respectively. Such letter contains the following language:

> ". . . However, section 212 (a) (2) makes no provision for the exclusion of aliens convicted of illicit possession of drugs, except in specified circumstances. Moreover, section 212 (a) (23) specifically covers only substantive violation of the narcotic laws and regulations; it is silent with respect to convictions of conspiracy to violate those laws and regulations. Section 201 (a) would amend section 212 (a) (23) to cure these deficiencies.
>
> "Section 201 (b) of the bill makes corresponding changes in section 241 (a) (11) of the 1952 act, providing for the deportation of alien narcotic addicts and aliens convicted of narcotic offenses. Like section 212 (a) (23), section 241 (a) (11) is silent with respect to convictions of conspiracy to violate the narcotic laws and regulations and contains similar limitation relative to convictions of illicit possession of narcotics. . . ." (Senate Report No. 1997, Calendar No. 2014, 84th Congress, 2d Session, p. 20.)

It follows, therefore, that a conviction of conspiracy was not a basis for deportation under Section 241(a)(11) of the Immigration and Nationality Act during the pendency of the instant deportation proceedings.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM H. COLLINS
Shoreham Building
Washington 5, D.C.

SAMUEL PAIGE
261 Broadway
New York 7, N.Y.
Attorneys for Petitioner

September, 1957.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,792

SEBASTIANO NANI, APPELLANT,

v.

HERBERT BROWNELL, JR., APPELLEE.

Appeal from the United States District Court for the District of Columbia

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Decided June 27, 1957

Mr. Samuel Paige, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, with whom *Mr. William H. Collins* was on the brief, for appellant.

Mr. E. Riley Casey, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Lewis Carroll*, Assistant United States Attorney, were on the brief, for appellee.

Before PRETTYMAN, BAZELON and WASHINGTON, Circuit Judges.

PER CURIAM: This is a deportation case, in which the District Court granted the Government's motion for summary judgment. The facts and the issues involved are stated in Judge McGuire's memorandum of March 27, 1957, and need not be restated here.

On the principal point of law, we agree with the District Court that the appellant's conviction of conspiracy (under 18 U.S.C. § 371) to violate the Jones-Miller Act, 21 U.S.C. § 174, and the Harrison Narcotic Act, 26 U.S.C. § 2553(a), was a conviction of "a violation of any law or regulation relating to the illicit traffic in narcotic drugs" within the meaning of Section 241(a)(11) of the Immigration and Nationality Act, 66 STAT. 204, 206-207, 8 U.S.C. § 1251(a)(11), and that appellant was thus rendered deportable. We also agree with the District Court that the warrant of deportation adequately stated the nature of the crime of which appellant had been convicted.

Appellant further contends that he was not notified that his case had been referred to the Attorney General for review [1] after the Board of Immigration Appeals had ruled in his favor, and that he had no opportunity to file a brief before the Attorney General.[2] We think that under the circumstances of this case appellant cannot fairly allege lack of due process, or any prejudicial noncompliance with law. In his complaint for declaratory judgment in the District Court he raised the precise question of law which had been considered by the Attorney General, and which in actuality appears to have been the only subject of consideration by the latter, namely, the question of law above mentioned as to the interpretation of Section 241(a)(11) of the Immigration and Nationality Act. The District Court ruled on that question

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[1] Under 8 C.F.R. 6.1(h) (1953).

[2] Citing and relying upon Section 292 of the Immigration and Nationality Act, 66 STAT. 235, 8 U.S.C. § 1362 (1952). Appellant also complains that a copy of the Board's decision was not served upon him, as required by 8 C.F.R. 6.1(f) (1953). But it appears that he received a copy after the Attorney General had reviewed the Board's action.

at appellant's request, and appellant now urges this court to reverse the ruling. Under the circumstances, the ruling of the District Court appearing to us to be clearly correct, we think that it would be a frivolity to remand the case to the Attorney General for the receipt of briefs to give appellant the chance of securing from the Attorney General a new and different decision on a point of law which in the view of the District Court and this court would be erroneous. Perhaps if some question of discretion or of a change in a factual finding had been involved, appellant would have a stronger argument. *Cf. United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954). The instant case involved solely a question of law, free of any element of administrative expertise or judgment.

Accordingly, the judgment of the District Court will be

Affirmed.

BAZELON, *Circuit Judge*, dissenting: Under applicable regulations [1] appellant was entitled to notice that the Board of Immigration appeals' decision in his favor had been referred to the Attorney General for review. The plain purpose of such notice is to afford appellant an opportunity to urge his position on brief to the Attorney General. Appellant was deprived of that opportunity since he was not given notice until after the Attorney General had reversed the Board's decision.

The integrity of each step in the regulatory scheme for administrative decision was emphasized in *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954). There the Board of Immigration Appeals, to which the Attorney General had delegated his discretionary power to suspend deportation, under § 19(c) of the Immigration Act of 1917,

[1] 8 C.F.R. § 6.1(f).

had denied Accardi's application for suspension. Accardi appealed on the ground that inclusion of his name on the Attorney General's list of "unsavory characters" precluded fair consideration of his case by the Board. The Court held that the regulations by which the Attorney General delegated his discretionary authority to the Board forbid him to dictate the Board's decision, even though, as the dissenting justices pointed out, the Board's "every decision is subject to his unlimited review and revision." 347 U.S. at 269-70. "In short," said the Court, "as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner." *Id.* at 267.[2] The Court remanded the case to the District Court to determine whether there had, in fact, been a prejudgment; and if so, to order a new administrative hearing.

As long as the regulations in the instant case remain operative, the appellant must be afforded the opportunity to defend the Board's decision in his favor and the Attorney General must fairly consider any argument made. Since appellant was denied the opportunity to defend the Board's favorable decision before the Attorney General reversed it, the Attorney General's decision was not made in accordance with law and is therefore fatally defective.

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[2] See *Service* v. *Dulles*, 25 U.S. L. Week 4494 (June 17, 1957).

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

April Term 1957 C. A. 4515-56

Filed June 27, 1957 Joseph W. Stewart, Clerk

No. 13,792

Sebastiano Nani, Appellant,

v.

Herbert Brownell, Jr., Appellee

Appeal from the United States District Court
for the District of Columbia

Before: Prettyman, Bazelon and Washington, Circuit Judges.

JUDGMENT

This Cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On Consideration whereof, It is ordered and adjudged by this Court that the judgment.....of the said District Court appealed from in this cause be, and the same is hereby affirmed.

Dated: June 27 1957

Per curiam.

Separate dissenting opinion by Circuit Judge Bazelon.